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In The
Supreme Court of the United States

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.,
Petitioners,
v.
JOSHUA DAVEY,
Respondent.

On Writ of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF HISTORIANS AND LAW SCHOLARS ON BEHALF OF PETITIONERS GARY LOCKE, ET AL.

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal and religious historians and law scholars who have studied, taught and written in the area of constitutional and religious history and the First Amendment in law schools and undergraduate schools across America. *Amici* file this brief in support of the Petitioners and in response to anticipated arguments by the Respondent and his *amici* about the historical record related to the no-funding principle as applied in the Washington Constitution. In particular, *amici* seek to help fully explain the complex history of the rise of the no-funding and nonsectarian principles during the nineteenth century and the incorporation of those principles in the law.

Our names and institutional affiliations (listed for identification purposes only) are contained in Appendix A.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision effectively prevents states from providing stronger guarantees of church-state separation and religious liberty than the First Amendment compels. In particular, the decision calls into question the legitimacy of Article I, section 11 of the Washington Constitution which, according to the Washington Supreme Court, affords "far stricter [protection] than the more generalized prohibition of the first amendment to the United States Constitution." Weiss v. Bruno, 509 P.2d 973, 978 (Wash. 1973). One line of attack against Article I, section 11, in the courts below was that it, like other state no-funding provisions, is based on anti-religious – in

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[1] This brief is filed with the consent of the parties. No counsel for either party to this matter authored this brief in whole or in part. Americans United for S aration of Church and State, a national, nonsectarian public interest organization not a party to this case, provided costs associated with the production, printing, and filing of this brief.

particular, anti-Catholic – sentiment arising out of a nativist impulse during the nineteenth century, as putatively represented by the Blaine Amendment of 1876.

Such arguments oversimplify the history and purposes of the no-funding principle while they indict valid constitutional provisions based on the possible motivations of a limited number of individuals.

The no-funding principle, based on notions of religious liberty and liberty of conscience, arose prior to and independently of the advent of Catholic parochial schooling or the rise of the nativist movement. The no-funding principle was incorporated into many state constitutions during the nineteenth century for reasons unrelated to anti-Catholic animus.

The Blaine Amendment of 1876 arose as a result of a complex dynamic of forces that intersected over the issue of American public schooling. Supporters and opponents were motivated by concerns about universal free public education, protecting the integrity of public school funding, the obligation of states to provide universal education, the federal role in ensuring and funding education at the state level, and the funding of religious instruction and training. Although animus against Catholic immigrants and parochial schools may have motivated some supporters of the proposed amendment, that was not the only basis for the amendment or rationale for its support. Similarly, there is a lack of evidence that anti-Catholic animus was behind the passage of the Enabling Act of 1889.

There is no evidence that the framers of the Washington Constitution were motivated by anti-religious or Catholic animus in enacting Article I, section 11. As can best be determined, no delegate to the 1889 state convention expressed any animus toward Catholic or religious schooling in voting on Article I, section 11 or Article IX, section 4. On the contrary, the framers of the Washington Constitution revealed a sensitivity to religious issues by securing "perfect toleration of religious sentiment" in the state's organic act.

ARGUMENT

I. Introduction

The decision of the Ninth Circuit calls into question the legitimacy of Article I, section 11 of the Washington Constitution which seeks to ensure greater separation of church and state than is mandated under the First Amendment to the United States Constitution. Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989); Weiss v. Bruno, 509 P.2d 973, 978 (Wash. 1973).[2] On one level, the decision undermines the ability of states to be "freer to experiment with involvement [in religious matters] . . . than the Federal Government." See Walz v. Tax Comm'n, 397 U.S. 664, 699 (1970) (Harlan, J., concurring). Not only are issues of federalism at stake; as Justice Thomas has recently observed, there is a certain "wisdom of allowing States greater latitude in dealing with matters of religion and education." Zelman v. Simmons-Harris, 536 U.S. 639, 680 (2002) (Thomas, J., concurring). Although Justice Thomas may have been calling for greater flexibility for states to fashion benefits programs that include religious recipients, the principle of "greater latitude" provided state constitutional laboratories must extend both directions.

On a different level, the Ninth Circuit's holding provides support for critics of state constitutional provisions that mandate a stricter no-funding rule than exists under current interpretations of the Establishment Clause. Critics have insisted that such provisions, like Article I, section 11 and

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[2] Washington courts have also held that the free exercise provision of Article I, section 11 is more protective of religious liberty than is the First Amendment. See First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992); State v. Balzer, 954 P.2d 931 (Wash. Ct. App. 1998).

Article IX, section 4, of the Washington Constitution, are based on hostility toward religion, and toward Catholicism and Catholic schooling in particular.[3] Members of this Court have expressed similar sentiments.[4] The Mitchell plurality's statements regarding the non-sectarian principle and the Blaine Amendment were made, however, without the benefit of briefing on this subject.

The no-funding principle, with its prohibition on funding sectarian programs and institutions, rests on a more "spacious conception"[5] of religious liberty and rights of conscience than this rendering suggests. The no-funding principle, as applied to educational matters, arose independently of and prior to the rise of Catholic parochial schooling and the organized nativist movement of the mid-nineteenth century. Many state constitutions – including Washington's – contain no-funding provisions that have nothing to do with anti-Catholicism or nativist sentiment. Similarly, the Blaine Amendment, which served as a model for the Enabling Act and, by implication, for Article IX, section 4 (but only indirectly for

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[3] See Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 18 (1999) ("[A]n examination of Blaine's history shows that it was borne out of a spirit of religious bigotry and intolerance directed against Catholic immigrants during the nineteenth century. It was not conceived in the spirit of the First Amendment but to impose restrictions that its advocates thought were missing from the Constitution and Bill of Rights."); Philip Hamburger, Separation of Church and State 335 (2002) ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states.").

[4] See Mitchell v. Helms, 530 U.S. 793, 828-29 (2000) (plurality opinion).

[5] See McCollum v. Bd. of Educ., 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring).

Article I, section 11), cannot be explained as a mere exercise in Catholic bigotry. As a result, neither the no-funding principle nor Washington's constitutional provisions deserve invalidation on this ground.

II. The No-Funding Principle Arose Independently of Anti-Religious Animus.

A. Origins of the No-Funding Principle

The legal rule against public funding of religious enterprises, activities, instruction and worship is based on principles of religious liberty and rights of conscience that found expression in the struggle for independence from Great Britain and the founding of the national and state governments. As early as the 1770s, Thomas Jefferson and James Madison were equating government financial support for religion with infringements on religious liberty and rights of conscience. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical," Jefferson wrote in 1779; "that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern."[6] Madison echoed Jefferson's belief that funding of religious worship and instruction violated notions of liberty:

> Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all

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[6] A Bill for Establishing Religious Freedom, 12 June 1779, in 5 The Founders' Constitution 77 (Philip B. Kurland & Ralph Lerner, eds., 1987).

cases whatsoever.[7]

Jefferson and Madison did not make these arguments in the abstract but raised them in opposition to an effort by the Virginia Assembly to impose an assessment for the support of houses of worship and teachers of religion, including teachers in private religious schools.[8] Madison applied this principle later as President when he vetoed a bill that would have authorized an Episcopal Church in the District of Columbia to receive poor funds for the education and care of destitute children.[9]

Although Jefferson and Madison's spacious views on church-state separation were not shared by all of their contemporaries, greater consensus existed over the issue of public funding of religion.[10] Funding of religious activities and enterprises was viewed as the anthesis of disestablishment. In

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[7] Memorial and Remonstrance Against Religious Assessments, 20 June 1785, in The Founders', supra note 6, at 82.

[8] See Douglas Laycock, 'Nonpreferential' Aid to Religion: A False Claim About Original Intent, 27 Wm & Mary L. Rev. 875, 897 & n.108 (1986); Thomas Buckley, Church and State in Revolutionary Virginia, 1776-1787 133 (1977) ("The assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so.").

[9] See Veto Message to Congress, Feb. 21, 1811, in James Madison on Religious Liberty 79 (Robert S. Alley, ed., 1985). A week later Madison vetoed another bill that provided federal land for a Baptist church in Mississippi, with Madison stating that it established "precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" Id. at 80.

[10] See Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 217 (1986).

providing that "there shall be no establishment of any one religious church," the North Carolina Constitution of 1776 declared that no person could be "obliged to pay . . . [for] the building of any house of worship, or for the maintenance of any minister or ministry."[11] Baptist leader Isaac Backus urged disestablishment in Massachusetts on similar grounds, denying the authority of a "civil Legislature to impose religious taxes" for the support of any ministry.[12] At the time of the framing of the First Amendment, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history."[13]

Thus, the principles of religious liberty, liberty of conscience, and separation of church and state arose independently of and prior to the rise of the common school movement or the development of the Catholic parochial school system. Although opportunities for applying this no-funding strain to religious schooling were rare prior to 1800, those instances alluded to above provide sufficient assurance that Jefferson and Madison viewed their constitutionally based principle as applying in the religious school context where worship and instruction in religious tenets take place.[14] This version of the no-funding principle therefore provides an independent and sufficient basis for nineteenth century opposition to funding of religious schools, apart from specific concerns about funding of Catholic schools.

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[11] N.C. Const. art. 34, in 5 The Federal and State Constitutions 2793 (Francis Newton Thorpe, ed., 1909).

[12] See The Founders', supra note 6, at 65 ("[W]e are persuaded that an entire freedom from being taxed by civil rulers to religious worship, is not a mere favor, from any man or men in the world, but a right and property granted us by God.").

[13] Curry, The First Freedoms, supra note 10, at 217.

[14] Id. at 141; Laycock, supra note 8, at 897.

B. The Rise of the Nonsectarian School

The no-funding principle also developed in conjunction with the rise of the common school. At the time of the nation's founding, public education was practically nonexistent with most schooling taking place through private tutors or in a handful of church-run schools.[15] Following the Revolution, early educational reformers such as Benjamin Franklin, Benjamin Rush, and Noah Webster began agitating for universal public schooling. These founding fathers were motivated by the conviction that education of children was indispensable for the stability and ultimate success of the new republic. Webster wrote in 1790 that education was "essential to the continuance of republican governments," as it "gives every citizen an opportunity of acquiring knowledge and fitting himself for places of trust."[16]

At the same time these framers criticized the traditional role of religion in the pedagogical process. In 1779, Thomas Jefferson drafted a plan for establishing public elementary schools in Virginia, proposing that "instead of putting the Bible and Testament in the hands of children at an age when their judgments are not sufficiently matured for religious inquiries, their minds may here be stored with the most useful facts from Grecian, Roman, European and American History."[17] Webster, writing a decade later, also criticized the reliance on religious texts and the teaching of sectarian doctrine common in most schooling. Webster encouraged relying on secular subjects such

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[15] See Essays on Education in the Early Republic xvi-xvii (Frederick Rudolph, ed., 1965); Readings in Public Education in the United States 75-140 (Ellwood P. Cubberely, ed., 1934).

[16] Noah Webster, On Education of Youth in America, (1790), in Essays on Education, supra note 15, at 65-66.

[17] Jefferson, A Bill for the More General Diffusion of Knowledge, in Jefferson: Magnificent Populist 248-49 (Martin A. Larson, ed., 1984).

as geography, economics, law and government, although he supported the reading of selective passages of the Bible for inculcating virtue and moral character.[18]

The first attempt at a comprehensive nonsectarian educational program came with the founding of the Free School Society of New York City in 1805.[19] From its inception the Society distinguished its charity schools from the local denominational schools by stressing the nonsectarian character of its curriculum which, its publications asserted, made its schools appropriate for children of all religious faiths. In addition to instructing in the "common rudiments of learning" the Society described its curriculum as teaching only "the fundamental principles of the Christian religion, free from all sectarian bias, and also those general and special articles of the moral code, upon which the good order and welfare of society are based." The Society asserted that its nonsectarian curriculum allowed children of all faiths to learn without the hobbling effects of sectarianism.[20]

For the first seventeen years of existence, the Free School Society competed with the denominational schools for state public school funds, although it increasingly received the lion's share of tuition and building funds.[21] In 1822, Bethel Baptist Church secured a state grant for construction of a school building from funds that had heretofore been available only to

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[18] See V.T. Thayer, Religion in Public Education 28-31 (1947); Webster, supra note 16, at 50-51, 64-67.

[19] See generally William Oland Bourne, History of the Public School Society of the City of New York (1870). See also John Webb Pratt, Religion, Politics, and Diversity: The Church-State Theme in New York History 158-203 (1967); Diane Ravitch, The Great School Wars: New York City, 1805-1973 3-76 (1974).

[20] Bourne, supra note 19, at 9, 38, 641.

[21] See Pratt, supra note 19, at 165-166.

the Free School Society.[22] The Society opposed the grant on grounds that it undermined nonsectarian education for children of all faiths and backgrounds and that funding of sectarian schools violated notions of separation of church and state. Here, the Society articulated several arguments that would serve as the basis for the no-funding principle: that the grant "impose[d] a direct tax on our citizens for the support of religion" in violation of rights of conscience; that funding of religious schools would cause competition and rivalry among faiths; that the school fund was "purely of a civil character;" and "the proposition that such a fund should never go into the hands of an ecclesiastical body or religious society, is presumed to be incontrovertible upon any political principle approved or established in this country. . . . that church and state shall not be united."[23] After considering the Society's memorials, the legislative Committee on Colleges, Academies and Common Schools in 1824 recommended that the Legislature discontinue funding for denominational schools, opining "whether it is not a violation of a fundamental principle . . . to allow the funds of the State, raised by a tax on the citizens, designed for civil purposes, to be subject to the control of any religious corporation."[24] The Legislature voted to authorize the New York City Common Council to make all future allotments of the school fund, which, the following year, voted to end the funding

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[22] See id. at 166-67; Bourne, supra note 19, at 49-50.

[23] Bourne, supra note 19, at 52-55, 88; Pratt, supra note 19, at 167.

[24] Bourne, supra note 19, at 70-72. The Society also claimed that it was "totally incompatible with our republican institutions, and a dangerous precedent in our free Government, to permit any part of such funds to be disbursed by the clergy or church trustees for the support or extension of sectarian education." Id. at 88.

of denominational schools.[25]

What is significant about this episode is that opposition to funding of sectarian schools arose in the context of a request made by a Protestant school. As the Society asserted in one of its resolutions, the funding of Bethel Baptist Church's school "promot[ed] . . . private and *sectarian* interests."[26] Also, significantly, the Society and the legislative committee viewed this bar as a "fundamental" constitutional mandate.[27] While it is possible that some Society officials were concerned about the potential, future establishment of Catholic parochial schools when they were crafting their arguments, nothing in the memorials and reports indicates such an awareness or apprehension. The first significant wave of Irish Catholic immigration was still a decade off, and it was not until the Second Provincial Council in 1833 that the American Catholic Church recommended the creation of a parochial school system.[28] According to popular understanding of the time, a sectarian school was any religious school in which particular doctrines were taught.[29] The Protestant denominational schools were *sectarian*. The developing consensus that public funds

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[25] See id. at 72-75; Pratt, supra note 19, at 167.

[26] Bourne, supra note 19, at 51.

[27] Id. at 70-72. The New York City Mayor and Common Council also supported the Society's position, arguing in its own memorial that funding of "religious or ecclesiastical bodies is [] a violation of an elementary principle in the politics of the State and country." Id. at 64-67.

[28] See Ray Allen Billington, The Protestant Crusade, 1800-1860 35-37 (1938); Peter Guilday, The National Pastorals of the American Hierarchy, 1792-1919 60-61, 74 (1923).

[29] See Memorial and Petition of the Mayor, Alderman, and Commonalty of the city of New York, in Bourne, supra note 19, at 66 (referring to the Protestant charity schools as "sectarian").

should not pay for religious education arose within this context.

That anti-Catholicism played no part in the rise of the no-funding principle is supported by an episode six years later. In 1830, the Roman Catholic Orphan Asylum and the Methodist Charity School petitioned for a share of the school fund to support their respective programs. The Free School Society, while raising the same church-state objections as before, also made what can best be described as an early argument about the pervasively sectarian character of the schools, noting that "one of the objects aimed at in all such schools is to inculcate the particular doctrines and opinions of the sect having the management of them."[30] In its characterization of sectarian schools, the Society did not distinguish between Catholic and Methodist programs. The Council's law committee concurred with the Society's arguments in its report, writing that "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians, [] would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights."[31]

> Your committee cannot, however, perceive any marked difference in principle, whether a fund be raised for the support of a particular church, or whether it be raised for the support of a school in which the doctrines of that church are taught as a part of the system of education.[32]

Despite the committee's recommendation, the Common Council approved payment to the Catholic Orphan Society on

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[30] Id. at 126. See also id. at 128 (arguing that the "system of education" in such schools is "so combined with religious instruction.").

[31] Id. at 139.

[32] Id. at 139-140.

the apparent theory that the funds primarily supported the *care* of the orphans, not their education. The Council, though, denied the request of the Methodist Charity School, reaffirming its 1825 decision that public funds could not pay for sectarian education.[33] The episode again indicates that all parties viewed the notion of sectarian education and the accompanying bar on its funding in generic terms, applying to all religious schools.[34] In this instance, because the Catholic Orphan Society was providing primarily a charitable service rather than sectarian education, it was eligible for public support. If anti-Catholicism had fueled the debate, then the outcome would have been reversed, or at least resulted in the denial of funds for both institutions.

As a result of these episodes, the no-funding principle was firmly established in New York by the time the first true controversy over Catholic school funding arose in the 1840s. In this familiar account, the New York Legislature rejected a petition from Bishop John Hughes for a share of the public school fund for Catholic parochial schools.[35] The Legislature

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[33] Id. at 145, 148.

[34] In urging the Council to adhere to its 1825 decision, the Law Committee argued that "Methodist, Episcopalian, Baptist, and *every other sectarian school*, [would] come in for a share of this fund. . . . It would be . . . no[] less fatal in its consequences to the liberties and happiness of our country, to place the interest of the school fund at the disposal of sectarians. It is to tax the people for the support of religion, contrary to the Constitution, and in violation of their conscientious scruples." Id. at 140 (emphasis added).

[35] Bishop Hughes criticized the common schools for their practice of Protestant Bible reading and instruction. In turn, Protestant churches and nativist groups characterized Catholic demands as a threat to public schooling and republican government. See Bourne, supra note 19, at 178-323, 350-495; N.Y. Observer, Jan. 16, 1841, at 10; Pratt, supra note 19, at 178-181; Ravitch, supra note 19, at 46-57.

enacted a law in 1842 that prohibited the granting of public funds to any school where "religious sectarian doctrine or tenet shall be taught, inculcated, or practiced."[36] Although the 1842 law may have been in response to the Catholic petition, the no-funding principle upon which it was based had been established in New York for twenty years.

III. There is No Evidence that Anti-Catholicism Played a Significant Role in the Development of Many Early State Constitutions.

Critics have argued that the no-funding provisions of many early state constitutions came about primarily through the influence of antebellum nativist groups, in particular, the Know-Nothing party. Massachusetts is commonly exhibit number one, where in 1854 Know-Nothings swept the 1854 state elections and were reputedly instrumental in obtaining passage of a no-funding provision in the state constitution.[37]

Nativism cannot be held responsible for all state enactments or explain the basis for similar and earlier enactments in other parts of the country where there was no significant religious dissension or nativist activity.[38] Michigan

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[36] Bourne, supra note 19, at 496-525; Pratt, supra note 19, at 182-190; Ravitch, supra note 19, at 58-76.

[37] See John R. Mulkern, The Know-Nothing Party in Massachusetts 76, 94-103 (1990); Lloyd P. Jorgenson, The State and the Non-Public School 85-93 (1956).

[38] Professor Ray Billington indicates in his seminal study of antebellum nativism that the Know-Nothings were relatively ineffective in enacting anti-Catholic legislation, even in those states where they briefly held clear majorities. Billington, supra note 28, at 412-417. Billington also notes that nativism was most effective in the northeastern states and that Know-Nothings "showed little strength in the middle west." Id. at 391, 396.

adopted a no-funding provision in its 1835 constitution[39] even though the state lacked a significant number of Catholic parochial schools and the enactment came before the wave of Catholic immigration.[40] The Michigan Constitution served as the model for similar constitutional provisions in Wisconsin (1848), Indiana (1851), Minnesota (1857), and Oregon (1857), all states without significant conflicts over parochial school funding at the time. In Wisconsin, for example, the common school movement with its emphasis on universal, nonsectarian education predated the Catholic Church's establishment of a parochial school system.[41] Despite some tension between native Protestants and German Catholic and Lutheran immigrants during the late territorial period, there is "no evidence that the

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[39] "No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries." Mich Const. of 1835, art. I, § 5. 4 The Federal and State Constitutions 1931 (Francis Newton Thorpe, ed., 1909).

[40] Thomas M. Cooley, Michigan: A History of Governments 306-329 (8th ed., 1897). Apparently, Catholic and Presbyterian clergy were instrumental in the movement to establish universal nonsectarian schooling at both the collegiate and common school levels. Id. at 309-311.

According to Professor Billington, at the same time that Michigan was drafting its constitution, the Protestant Home Missionary Society was reporting a lack of concern over Catholic activity in the upper midwest. See Billington, supra note 28, at 130.

[41] See Alice E. Smith, 1 The History of Wisconsin 588-589 (1985); Richard N. Current, 2 The History of Wisconsin, 162-169 (1976). See also Joseph A. Ranney, 'Absolute Common Ground': The Four Eras of Assimilation in Wisconsin Education Law, 1998 Wis. L. Rev. 791, 793-93, 796-97 (1998) (placing the development of the parochial school systems after the enactment of the 1848 Constitution). Even Prof. Jorgenson, a critic of the common school movement, documented no anti-Catholic animus in his study of the creation of the Wisconsin public education system. See Jorgenson, The Founding of Public Education in Wisconsin 68-93 (1956).

[Wisconsin] lawmakers and constitution makers were anti-religious in making the [no-funding] requirements, or that they harbored a prejudice against any sect."[42] A similar conclusion can be reached for the no-funding provision of the Indiana Constitution of 1851.[43] Finally, the Oregon Constitution of 1857, which influenced the drafters of the 1889 Washington Constitution, borrowed its no-funding language from the Indiana Constitution.[44] The minutes of the Oregon convention are bereft of any statements hostile to Catholicism or parochial school funding, with the only religious controversies involving whether to allow for legislative chaplains or acknowledge the deity in the constitution preamble. Like constitution framers in many other states, the Oregon delegates were committed to securing a "complete" separation of church and state based on matters of principle, not anti-religious animus.[45]

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[42] Smith, supra note 41, at 593.

[43] See Barclay Thomas Johnson, Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution, 35 Ind. L. Rev. 173, 200-203 (2001) (indicating that in 1850, less than six percent of Indiana inhabitants were immigrants and fewer still were Catholics. The no-funding provision was not "a remnant of nineteenth century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics."). Id. at 203.

[44] See The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857 302 (Charles Henry Clay, ed.,1926).

[45] Id. at 296-308. Although split over the issue of legislative chaplains, the Oregon delegates were in agreement about the principle against funding worship or religious institutions:

Mr. Grover: "The late constitutions of the western states have, step by step, tended to a more distinct separation of church and state, until the great state of Indiana, whose new constitution has been most recently framed, embracing very nearly the principle

Thus there is little evidence that anti-Catholicism or disdain for Catholic schooling played a significant role in the development of the no-funding principle or in the enactment of many no-funding provisions prior to the Civil War. On the contrary, state constitution drafters were primarily concerned with the survival of the nascent public schools and in securing their financial security.[46] Even in those states where anti-Catholicism may have played a role in the enactment of the no-funding provisions, the rationale for the no-funding rule was already well-established.

IV. The Blaine Amendment Arose from a Variety of Motivations, of which Anti-Catholicism was only One Factor.

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contained in this section, as reported, now under consideration."

"It is true this constitution goes a step further than other constitution on this subject, but if that step is in the right direction, and consistent with the proper development of our institutions, I see no weight in the objection that it is new. Let us take the step farther, and declare a complete divorce of church and state." Id. at 302-03.

Mr. Davey: "But sir, what is the theory of our government upon this subject? It is that the government shall be separated from the churches, and the maintenance and administration of religion; that religious duties shall be no function of the government. And why? Because the country contains persons of all religious denominations, as well as nonbelievers, and if you have religious services carried on and paid for by the government, you necessarily tax all the people to support sone one religion, let their sentiments be what they may." Id. at 303-04.

Mr. Williams: "Nor did he believe that congress had any right to take the public money, contributed by the people, of all creeds and faith [sic], to pay for religious teachings. It was a violent stretch of power, and an unauthorized one. A man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them." Id. at 305.

[46] Id. at 200.

The Blaine Amendment of 1876 has been maligned as an unfortunate episode in Catholic bigotry. See Mitchell, 530 U.S. at 828-29.[47] Although it is indisputable that anti-Catholic animus motivated many supporters of the amendment and colored the debates surrounding its near enactment, this is an incomplete account. The Blaine Amendment was the culmination of eight years of heightened attention to and conflict over the "School Question." Arising in the years following the Civil War, the School Question involved more than a concern about parochial school funding; that issue was part of a larger controversy over the responsibility and role of the federal government in public education, over whether that education should be truly universal for all social and economic classes and races (including the children of recently freed slaves), over ensuring the financial security of the still nascent public education system, and over whether that education should be secular, nonsectarian (i.e., watered-down Protestantism), or more religious.[48] The battle lines were not drawn solely between Catholics and nativists but involved other groups and concerns: liberal Protestants, free-thinkers, and Jews who opposed the religious exercises and nonsectarian character of the nation's schools; conservative Protestants who sought to preserve or *increase* the Protestant character of many public schools; education and civil rights reformers who sought a larger government role in funding and regulating public education; Democratic and Republican partisans who had little interest in education issues but viewed Catholics as a voting block to cultivate or demonize; and state-rights advocates who saw no government role in education, particularly at the federal and state levels.

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[47] See Charles L. Glenn, Jr., The Myth of the Common School 73-77 (1988); Viteritti, supra note 3, at 145-155.

[48] Ward M. McAfee, Religion, Race and Reconstruction 105-124 (1998).

Also, it is inaccurate to speak of *a* Blaine Amendment, particularly as a concept or model for the Enabling Act or state constitutional provisions. Rather, the 1870s witnessed multiple proposals for a education-related constitutional amendment – President Ulysses Grant's proposal; James G. Blaine's initial proposal; a Democratic alternative; secularist proposals and ultra-conservative religious proposals; the House-passed version; and the failed Senate version – all of which contained different language and received varying levels of support and opposition.[49] As addressed below, Blaine's original proposal received much greater support among Democrats and Catholics than the final Senate version.[50] The Enabling Act and the Washington Constitution more closely track the original Blaine proposal than the final Senate version.

The impetus for the Blaine Amendment came out of a controversy over an 1869 decision by the Cincinnati school board to abolish the practice of daily prayer and readings from the King James Bible.[51] Although initially enjoined by a trial court, a unanimous Ohio Supreme Court upheld the Board's action. See Board of Education v. Minor, 23 Ohio St. 211 (1872). Closely followed throughout the country, the Cincinnati "Bible War" reignited a debate over the religious character of public schooling – over whether schools should retain their Protestant nonsectarian complexion or whether they

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[49] See Steven K. Green, The Blaine Amendment Reconsidered, 36 J. Legal Hist. 38, 47-55 (1992) (discussing the various competing proposals).

[50] See 20 Cong. Rec. 5581 (Aug. 14, 1876) (remarks of Senator Francis Kernan (D-NY)).

[51] See generally The Bible in the Public Schools: Arguments in the Case of John D. Minor versus the Board of Education of the City of Cincinnati (Robert McCloskey, ed., 1870); Harold M. Helfman, The Cincinnati 'Bible War,' 1869-1870, 60 Ohio St. Arch. & Hist. Quart. 368 (1951).

would become truly secular and open to all faiths and nationalities. More broadly, the controversy implicated the future of American public schooling, with some believing that a secular educational system would ameliorate Catholic complaints about Protestant-oriented schooling but others fearing that a truly secular educational system would engender even greater competition for limited school funds between Catholic, Protestant and public schools.

Following the Cincinnati case, the New York and Chicago city school boards prohibited Bible reading and religious instruction in their respective schools, with similar bans being adopted in Michigan and other northern states.[52] The actions deeply split the Protestant community, with some believing that the removal of Protestant prayer and bible reading would lead to immorality and "the ruin of the Republic."[53] Others, including Rev. Henry Ward Beecher, argued that "compulsory Bible in schools is not in accordance with American doctrine of the liberty of conscience" and should be abolished.[54] Finally, during the same period (1868-1876) ultra-conservative Protestants mounted a campaign for a constitutional amendment to insert a recognition of God in the Preamble, in part to ensure that America and its institutions remained "Christian."[55] This set of events led the New York

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[52] N.Y. Times, Dec. 9, 1872, at 8.

[53] Conspiracy Against the School System, Christian Advocate, Nov. 25, 1869, at 372.

[54] N.Y. Tribune, Dec. 3, 1869, at 5. Beecher wrote that the state "has no business to teach religion, or to show partiality to one or another sect in religion." Id.

[55] The Christian Statesman, Feb. 28, 1874, at 35; see Steven K. Green, "The National Reform Association and the Religious Amendments to the Constitution, 1864-1876," (1987) (unpublished M.A. thesis, on file with the Department of History at the University

Tribune in 1875 to opine that the "School Question" "excites sharp controversy," and was threatening "the very existence of the republic. . . . The admission of parochial schools as a part of the public-school system is openly demanded. Sooner or later the broad question must be met, 'Whether popular education belongs to the State or the churches.'"[56]

It was in this climate that President Ulysses Grant, and ultimately James G. Blaine, proposed amending the Constitution to settle the School Question. As introduced by Blaine, the amendment sought to achieve two things: (1) make the provisions of the First Amendment apply directly to state actions; and (2) to prohibit the allocation of public school funds or other public monies or land to religious institutions.[57] Grant's proposal, as represented in his annual message to Congress on December 7, 1875, was much broader, recommending an amendment "making it the duty of each of the several states to establish and forever maintain free public schools adequate to the education of all the children in the rudimentary branches . . . irrespective of sex, color, birthplace, or religions."[58] Even though this provision did not make it into the final language of Blaine's proposal, the issue of a federally

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of North Carolina - Chapel Hill).

[56] N.Y. Tribune, July 8, 1875, at 4.

[57] "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, not any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 Cong. Rec. 205, 44th Cong. (1st Sess.1875).

[58] See Seventh Annual Message, Dec. 7, 1875, reprinted in Ulysses S. Grant 92 (Philip P. Moran, ed., 1968). Grant also recommended the taxation of church property. Id.

mandated education fueled the debate.[59] The issue of universal education also had racial implications, complicating the debate among Republicans and Democrats.[60]

To be sure, many observers viewed the amendment as crass political maneuvering designed to appeal to anti-Catholic voters.[61] Others, however, viewed the amendment as an opportunity to resolve the larger School Question while avoiding religious strife. Both the Republican New York Times and the Democratic New York Tribune supported Blaine's proposal as a way of diffusing the religious issue.[62] The

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[59] McAfee, supra note 48, at 4-5, 15-21, 105-124 (1998). The nation's leading religious journal, The Independent, raised concerns the proposed amendment was the first step toward mandating states to provide universal education: "Whether a State shall have a public school system or not is purely and absolutely a State question . . . and it should be left to the sovereign discretion of every State." See Samuel T. Spear, Religion and the State, or The Bible and the Public Schools 21 (1876). See also Lyman Atwater, Civil Government and Religion, Presbyterian Quarterly and Princeton Review 195 (April 1876) (arguing that universal secular education was "wholly beyond the proper function of the national government, and an unwarranted invasion of the proper liberties and franchises of the States.").

[60] McAfee, supra note 48, at 105-124.

[61] See The Nation, Mar. 16, 1876 at 173. ("Mr. Blaine did, indeed, bring forward at the opening of Congress a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.").

[62] See N.Y. Times, Dec. 8, 1875, at 6, and Dec. 15, 1875, at 6; N.Y. Tribune, Dec. 8, 1875, at 6, and Dec. 15, 1875, at 4 ("Thinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible."). N.Y.

Independent, the nation's leading religious journal, also viewed the controversy in broader terms, insisting that the funding issue "manifestly does not cover the whole question in controversy."[63] Rather, the controversy "bring[s] to the surface the whole subject of Church and State, civil government and religion, in their relations to each other."[64]

Therefore, a combination of issues – whether public schooling should be secular or religious and truly universal for all faiths, races and nationalities, whether the national government should mandate schooling at the state or local levels, and how best to diffuse religious strife – fueled the debate surrounding the Blaine Amendment as much as the issues of parochial school funding or anti-Catholicism.[65] For many people these issues were interrelated. The fact that they were intertwined, however, does not mean that support for the amendment was one-dimensional or limited solely to efforts to disadvantage Catholics by denying them a share of the public

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Tribune, Dec. 15, 1875, at 4.

[63] Spear, supra note 59, at 18.

[64] Id. at 24. According to The Independent, the School Question also implicated issues of federal control over education and whether public schools would retain their Protestant nonsectarian character, would become more Protestant in their practices, or would become "purely secular." Id. at 17-18, 21-22, 44-66.

[65] Blaine's motives are unclear. There is no evidence that Blaine had any personal animosity toward Catholics. His mother was Catholic and his daughters were educated in Catholic schools. Most likely, he viewed the amendment as a means of capitalizing on public interest in the School Question in hope that it would help secure him the Republican presidential nomination. See Marie Carolyn Klinkhamer, The Blaine Amendment of 1875: Private Motives for Political Action, 42 Cath. Hist. Rev. 15, 32-34 (1955); Green, supra note 49, at 54.

school fund. Despite the tendency of some elements to resort to inflamed rhetoric, most observers viewed the controversy in broader terms about the future of American education.

The Senate debate reflects these myriad concerns. Floor debate focused on issues of federalism, the states' rights to control education, the financial security and religious character of public schools, the partisan nature of the amendment and, finally, the proposed ban on parochial school funding.[66] For example, Senator Theodore Randolph (D-N.J.) charged that the proposed amendment would infringe on state authority over education and create new obligations upon the states by imposing the duty to educate, an area reserved to the states under the 10th Amendment.

> (T)here is not only no duty devolving upon the Federal Government, by reason of any provision in the Constitution, to directly care for the education of its citizens, but that the attempt upon the part of the Federal power to exercise authority in this direction would be without warrant, and as pernicious in precedent as it would finally become dangerous in practice.[67]

Various senators echoed Randolph's concern that the amendment would usurp state authority over educational matters.[68] Senators also distinguished between Blaine's original

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[66] See 4 Cong. Rec. 5580-5595 (1876).

[67] Id. at 5455. Beyond his specific concern over usurpation of state authority over education, Randolph also believed the amendment threatened state control over general expenditures by imposing an obligation on the states to establish schools. Id.

[68] Senator Kernan: "I believe that the matter of educating our children may be wisely left to the people of each State. I believe that it is a home right." Id. at 5580.

Senator Stevenson: "No, sir; this power is not in the Federal Government. Kentucky does not want New England and other states to dictate to her what her schools shall be or what her taxes shall be, and least of all what her religion shall be." Id. at 5589.

proposal, which had far wider support, and the final Senate version that not only contained a much broader no-funding provision but also guaranteed that Protestant bible reading could not be excluded from the public schools.[69] Significantly, New York Democratic senator Francis Kernan, a Catholic, voiced his support for Blaine's original proposal.[70]

In the end, the amendment failed because of a combination of concerns about federalism, mandating universal public education, the religious/secular character of public schools, and the imposition of federal constitutional protections on the states.[71] It also failed due to overreaching by Senate Republicans who expanded on Blaine's original no-funding proposal, a proposal that had much wider support. While anti-Catholicism motivated some supporters of the various proposals, that factor alone did not control the debate and should be distinguished from sincere beliefs that funding of parochial schools would threaten the nation's commitment to public schooling and undermine church-state separation. The Blaine Amendment must thus be viewed within this larger controversy over the character and future of American public

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[69] Id. at 5453.

[70] Id. at 5580. Kernan stated that Blaine's proposal "met with no considerable opposition in any quarter. It declares that money raised in a State by taxation for the support of public schools or derived from any public land therefor or any public lands devoted thereto shall not be under the control of any religious sect or denomination, nor shall any money so raised by divided among the sects or religious denominations. *Were this before the Senate I would support it.*" Id. (emphasis added).

[71] Anson Phelps Stokes, 2 Church and State in the United States 727 (1950).

schooling.

V. There is No Evidence that the Framers of Article I, Section 11, were Motivated by Anti-Religious or Catholic Animus.

In framing the Washington Constitution of 1889, drafters included Article I, section 11's prohibition on applying or appropriating public monies for "religious worship, exercise or instruction, or the support of any religious establishment." This language (and similar language contained in Article IX, section 4) originated from several sources. First, the federal Enabling Act of 1889, which authorized the drafting of the Washington Constitution, required the state constitutional convention to include a provision "for the establishment and maintenance of a system of public schools, which shall be open to all children . . . and free from sectarian control."[72] Although the Enabling Act likely served as the basis for Article IX, section 4,[73] the Act's connection to Article I, section 11, the provision implicated in Davey, is less clear. In addition, the Washington framers borrowed heavily from other state constitutions, most particularly the Oregon Constitution, and to a lesser extent the California and federal constitutions. See Robert F. Utter & Hugh D. Spitzer, The Washington State Consitution: A Reference Guide 9 (2002). Also, the state Declaration of Rights, which includes Article I, section 11, drew from a model drafted by W. Lair Hill, which too was based on the Oregon Constitution. Id. As discussed above, there is no evidence that anti-Catholic or religious animus motivated the drafting of the Oregon Constitution.

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[72] See Enabling Act, ch. 180, § 4, 25 Stat. 676-77 (1889).

[73] "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

Assuming the relevance of the Enabling Act for Article I, section 11, divining a motivation for its no-funding requirement is all but impossible. Congress enacted the Act in 1889 to authorize and facilitate the admission of North and South Dakota, Montana and Washington as states. Of primary interest for members of Congress was to ensure a balance of Democratic and Republican representation from the new states; other issues were of secondary import. See 20 Cong. Rec. 871 (1889).[74] The House Committee on Territories reported language that became section 4 of the Act in the original bill (H.R. 8566), apparently without any recorded discussion of the school provision.[75] Although the Blaine Amendment likely influenced the language of section 4, there is little legislative history to explain its purpose.[76]

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[74] See Robert F. Utter and Edward J. Larson, Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution, 15 Hast. Const. L. Quart. 451, 460 (Spring 1988).

[75] See H.R. Rep. No. 1025 (1888).

[76] Utter and Larson point to contemporaneous statements by Senator William W. Blair, that indicate his view that section 4 was to prohibit funding of sectarian schools while ensuring that public schools could continue to educate children in "virtue, morality and the principles of the Christian religion," likely code words for Protestant nonsectarianism. Utter & Larson, supra text, section V at 26, at 461-467. Although no senator objected to Blair's comments about section 4, as Utter and Larson contend, no senator concurred. See 20 Cong. Rec. 2100-2101 (Feb. 20, 1889). Silence alone cannot be interpreted as consent or agreement. See United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."). See also Anson Phelps Stokes and Leo Pfeffer, Church and State in the United States 566 (1964) (discussing Blair's association with ultraconservative religious causes). Blair's sentiments with regard to the Enabling Act cannot be attributed to other members of Congress.

No record exists of the debates of the Washington Constitutional Convention of 1889.[77] However, the proceedings and recorded votes are contained in an official Journal which can be used in conjunction with contemporaneous newspaper reports to develop an account of the convention.[78] The convention considered Article I, section 11 and Article IX, section 4, on July 25 and 29, and August 7 and 10, 1889.[79] Even though regional newspapers closely covered the deliberations, frequently reproducing debates verbatim, no contemporary article for those days mentions any statement or comment by delegates expressing hostility toward, or support for, Catholic parochial schools. While the absence of a reported account is not necessarily evidence that such sentiments were not expressed, the newspapers were otherwise meticulous in reporting on religious issues.[80] Extensive debate occurred over a proposal to recognize God in the constitution's preamble with additional debate taking place over whether to exempt church property from state taxes, with the convention rejecting arguments that exempting churches from taxation violated

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[77] See The Journal of the Washington State Constitutional Convention 1889 vi-vii (1962).

[78] Id. Detailed newspaper accounts of the convention are contained in Washington State Constitutional Convention 1889: Contemporary Newspaper Articles (1999) (containing articles from fifteen Washington and Oregon newspapers).

[79] See The Journal of the Washington State Constitutional Convention 1889, supra note 77, at 154-55, 190-91, 276-77, 329-330.

[80] See Washington State Constitutional Convention, supra note 78, at 1-52, 1-77, 2-63, 3-38/39, 3-78, 4-46/47, 4-80, 5-57/58, 5-59/60, 5-79, 5-86, 6-14, 6-23, 6-75, 6-81, 6-115.

separation of church and state.[81] Significantly, on the same day that delegates debated exempting churches from taxation (August 7, 1889), an item extensively covered by several newspapers, the convention reported out Article IX, section 4 (the school funding provision) without any recorded debate.[82] Despite coverage by several newspapers, no article reports any statements indicating hostility or animus toward any religious group or institution.[83] In sum, there is no evidence in the accounts of the convention to indicate that the delegates held any animosity toward any religion, or Catholicism in particular, or that they enacted Article I, section 11 or Article IX, section

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[81] See Oregon Statesman, Aug. 2, 1889, p.1.col 1 (preamble); Puget Sound Weekly Argus, Aug. 8, 1889, p. 1. col. 3 (preamble); Seattle Times, July 25, 1889, p. 1, cols. 2-4 (exemption); Spokane Falls Review, July 26, 1889, p. 1, cols. 6-9 (exemption); Tacoma Daily Ledger, July 26, 1889, p. 4, cols. 1-4 (exemption); Walla Walla Weekly Statesman, Aug. 3, 1889, cols. 1-2 (preamble).

[82] Tacoma Daily Ledger, Aug. 8, 1889, p. 4, cols. 1-4; Tacoma Morning Globe, Aug. 8, p. 1, cols. 1-2. The only recorded debate on either religion clause took place on August 10, 1889, involving Article IX, section 4, where the delegates turned back efforts to amend the provision by inserting a prohibition on "religious exercise or instruction" in the public schools and substituting the word "religious" for "sectarian" in the provision barring "sectarian control or influence over public schools." See Spokane Falls Review, Aug. 11, 1889, p. 2, col. 6; Tacoma Morning Globe, Aug. 11, 1889, p. 1, cols. 1-2.

[83] As can best be determined, the sole reference to the Catholic Church occurred during the debate over exempting church property from state taxes, with Delegate S. G. Cosgrove, a supporter of the exemption, reportedly stating that "He thought efforts to fix a limit [on the exempt value of church property] were directed at the Catholic church, '[o]r at least that statement has been made in print, and by a man prominent in movement to limit [the] exemption." Tacoma Daily Ledger, Aug. 8, 1889, p. 4, cols. 1-4. As noted, the convention *rejected* efforts to exclude churches from the tax exemption.

4, with an intent to discriminate against religion.

CONCLUSION

The constitutional prohibition on funding sectarian programs and institutions is based on principles of religious liberty and rights of conscience. This rule arose independently of and prior to the rise of Catholic parochial schooling and the organized nativist movement of the mid-nineteenth century. In addition, there is no evidence that the no-funding provisions of the Washington Constitution are based on any form of anti-religious animus. Those provisions stand as a legitimate expression of the people of Washington to guarantee the fullest protection of religious liberty and separation of church and state.

Respectfully submitted,

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July 17, 2003

APPENDIX A

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